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No. 88-633

In the Supreme Court of the United States

OCTOBER TERM, 1988

MANSION HOUSE CENTER NORTH REDEVELOPMENT COMPANY, ET AL. PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

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Petitioners contend that the district court lacked the power to modify its previously entered judgment, which had been affirmed on appeal, under Fed. R. Civ. P. 60(a).

1. In 1979, the United States filed three foreclosure actions. In December 1985, the district court entered judgment in favor of the United States in each of the cases and ordered a foreclosure sale (Pet. App. A6-A9). Petitioners appealed, and the Eighth Circuit affirmed. *United States* v. *Mansion House Center Redevelopment Co.*, 796 F.2d 1039 (1986).

The December 1985 decision of the district court incorporated by reference stipulations of the parties, including a stipulation that the United States was entitled to foreclose on the security, which included both personal and real property, if petitioners' one legal defense proved insufficient (Pet. App. A6, A8). That defense—that the Department of Housing and Urban Development was re-

quired to resolve the case in accordance with a 1982 settlement agreement – was rejected (*id.* at A9), and the district court entered judgment in favor of the United States in each of the cases. In a separate section of the order, the district court set forth the procedures that were to govern the sale of the security. Those procedures did not specifically mention personal property at the buildings but seemed to subsume the personal property into the real property and to treat both as one (*id.* at A10-A12). Thus, after affirmance of the order by the Eighth Circuit, the United States moved to have the procedures set forth in the 1985 order modified so as explicitly to authorize sale of the personal property.

In December 1987 the district court granted the United States' motion in part (Pet. App. A13-A31), and in January 1988 it entered a supplemental order directing the judicial sale of the personal property (*id.* at A32-A39). Petitioners appealed again, and the Eighth Circuit again affirmed (*id.* at A1-A5).

2. The decision of the court of appeals is correct and does not conflict with any decision of this Court or another court of appeals. Review by this Court is not warranted.

a. Petitioners' contention concerning the type of error that can be corrected under Rule 60(a) is without merit. Under that Rule, the district court has the power to correct omissions in its judgment so as to reflect what was understood, intended, and agreed on by the parties and the court. See, *e.g.*, *Blanton* v. *Anzalone*, 813 F.2d 1574, 1577 (9th Cir. 1987) (deletion of unintended award of prejudgment interest); *In re Jee*, 799 F.2d 532, 534-535 (9th Cir. 1986) (amendment of dismissal order to reflect judge's intention that dismissal be without prejudice), cert. denied, No. 86-1378 (Apr. 20, 1987). The district court's power includes the authority to award additional relief

contemplated at the time of entry of the judgment but inadvertently omitted therefrom. See, *e.g.*, *Chavez* v. *Balesh*, 704 F.2d 774 (5th Cir. 1983) (increase of damage award to include liquidated damages); *Trujillo* v. *Longhorn Mfg. Co.*, 694 F.2d 221 (10th Cir. 1982) (increase in backpay award to reflect correct number of weeks plaintiff was unemployed); *Hayden* v. *Scott Aviation, Inc.*, 684 F.2d 270 (3d Cir. 1982) (increase of damage award to reflect delay damages under state law); see also *Pattiz* v. *Schwartz*, 386 F.2d 300, 303 (8th Cir. 1968) (Blackmun, J.).

Here, it is undisputed that the parties intended that the personal property as well as the real property be sold to satisfy petitioners' debt to the government if, as proved to be the case, the courts rejected petitioners' defense to the foreclosure action. Stipulations to that effect were incorporated by reference in the judgment. The district court therefore had ample power under Rule 60(a) to conform its judgment to the original intent of the parties and the court.

Petitioners state that the decision in this case conflicts with the panel decision in *Willie* v. *Continental Oil Co.*, 746 F.2d 1041 (1984), vacated, 760 F.2d 87 (1985), appeal dismissed en banc, 784 F.2d 706 (5th Cir. 1986). Petitioners incorrectly indicate (Pet. 6) that the panel decision was "*aff'd en banc*, 784 F.2d 706 (5th Cir. 1986)." To the contrary, the panel opinion was vacated, and the en banc court did not endorse the panel's reasoning or even reach the same ultimate result.

The en banc court did hold (784 F.2d at 707) that the motion at issue was properly brought under Fed. R. Civ. P. 59(e) rather than Rule 60(a), but it did not explain the basis for that holding. In any event, *Willie* is distinguishable on its facts from the present case. In *Willie*, the district court entered judgment in favor of the

plaintiff against one defendant and also awarded that defendant a right of contribution against another defendant that had previously settled with the plaintiff. The award of contribution was contrary to a pretrial stipulation, but—unlike this case—the district court did not incorporate that stipulation into its judgment by reference. When the district court did eventually amend its judgment to reduce the plaintiff's recovery and release the settling defendant from the contribution requirement previously imposed, the court was quite clearly doing something other than carrying out its own original intent. Here, by contrast, there is no doubt that the district court intended all along that petitioners' personal property would be sold to satisfy their debt, and the problem in the judgment lay only in the district court's draftsmanship. There is no inconsistency between *Willie* and the result reached here.*

b. Relying on two 1940 court of appeals cases, a concurring opinion in a 1958 court of appeals case, and a 1945 district court decision, petitioners also incorrectly argue (Pet. 9) that the decision in this case creates a conflict concerning the jurisdiction of the district courts, after issuance

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* Nor is there any inconsistency between the decision below and *Charles* v. *Daley*, 799 F.2d 343 (7th Cir. 1986), or *Mullins* v. *Nickel Plate Mining Co.*, 691 F.2d 971 (11th Cir. 1982). In *Charles*, a complex attorneys' fees dispute bearing no resemblance to the present case, the court simply held that "Rule 60(a) is designed to correct scriveners' errors, to make the judgment carry out the original plan" (799 F.2d at 347)—a description that did not fit the relief sought in *Charles* but precisely fits the relief granted here. See also *United States* v. *Griffin*, 782 F.2d 1393, 1397 (7th Cir. 1986) ("The thread uniting these cases is that factual and legal misconceptions, as well as exercises of discretion, may not be corrected under Rule 60(a), while blunders in execution may be."). In *Mullins*, the district court attempted retroactively to certify its order granting partial summary judgment as an appealable order under Fed. R. Civ. P. 54(b), an effort that the court of appeals held that Rule 60(a) does not sanction.

of an appellate mandate, to modify a judgment. Before 1976, many courts, including the Eighth Circuit, indicated that a district court lacks jurisdiction to entertain a Rule 60 motion after its judgment has been affirmed on appeal, unless the appellate court first grants leave to allow the district court to do so. In 1976, however, this Court held that, without leave of the appellate court, a district court can entertain a Rule 60(b) motion after its judgment has been affirmed. *Standard Oil Co.* v. *United States,* 429 U.S. 17, 19 (1976) (per curiam). Thereafter, the appellate courts have uniformly ruled that without leave of the appellate court a district court can entertain a motion under Fed. R. Civ. P. 60(a) after its judgment has been affirmed. See, *e.g., Panama Processes, S.A.* v. *Cities Service Co.,* 789 F.2d 991, 993-995 (2d Cir. 1986); *Dura-Wood Treating Co.* v. *Century Forest Industries,* 694 F.2d 112, 114-115 (5th Cir. 1982). Moreover, petitioners did not raise or brief in the Eighth Circuit any issue concerning the "mandate rule" for which they now contend, and the Eighth Circuit accordingly did not address the issue in its opinion. Consideration of that issue by this Court is thus foreclosed.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

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